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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1986

MOSHER STEEL COMPANY, DIVISION OF TRINITY INDUSTRIES, AND ROGER LOVE, Plant Manager,
Petitioners,

v.

WILLIAM E. BROCK, Secretary of Labor,
United States Department of Labor,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. By its decision in *Franks v. Delaware*, 438 U.S. 154 (1978), which restricted challenges to the veracity of affidavits for criminal warrants, did the Court intend to prohibit challenges to the fairness of administrative inspection plans that may be the basis for an administrative inspection warrant under *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978)?

2. How may an employer challenge the fairness of OSHA's administrative inspection program, in order to obtain meaningful judicial review of whether the inspection program provides for selective, discriminatory enforcement of the Occupational Safety and Health Act?

PARTIES TO PROCEEDING IN COURT BELOW

In this proceeding, MOSHER STEEL COMPANY, a division of Trinity Industries, Inc., and ROGER LOVE are Petitioners. WILLIAM E. BROCK is the current Secretary of Labor.

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v.

WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioners, MOSHER STEEL and ROGER LOVE, respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on July 30, 1985.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals *(see,* App. *infra)* is reported at 791 F. 2d 1535. The opinion of the United States District Court for the Northern District of Alabama is unofficially reported at 11 BNA OSHC 1965. *(see,* App. *infra)*

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was rendered on June 25, 1986. A timely Petition for Rehearing was denied on July 30, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fourth Amendment, United States Constitution, provides:

> The right of the people to be secure in their persons houses, pape- ., and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The Fifth Amendment, United States Constitution, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia; when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 28, United States Code, Section 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Title 28, United States Code, Section 2201(a), Creation of Remedy, provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Federal Rules of Civil Procedure, Rule 26(b)(1), paragraph 1, provides:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

STATEMENT OF THE CASE

On August 16, 1983, a compliance officer with the Occupational Safety and Health Administration (OSHA) applied for and obtained a warrant to conduct an OSHA inspection of Mosher Steel Company's premises in Birmingham, Alabama. The warrant was not based on a complaint or other specific evidence of any violations on Mosher's premises, but rather on OSHA's so-called administrative "plan" for selecting businesses for programmed inspections. OSHA served the warrant on Mosher on August 17, 1983. Mosher believed that its "selection" for inspection was arbitrary and unreasonable, and desired a judicial determination of the reasonableness of OSHA's inspection plan.[1] Mosher therefore did not permit the inspection on the grounds that the warrant itself did not establish probable cause, and that the administrative plan upon which it was based is unreasonable and discriminatory.

On September 14, 1983, the Secretary of Labor petitioned the district court to hold Mosher and its plant manager in civil contempt for failure to comply with the warrant. Mosher answered the petition and denied the validity of the warrant.

In addition, Mosher filed a counterclaim for declaratory judgment alleging that OSHA's entire administrative inspection plan is unreasonable and discriminatory in design and application, in violation of the Fourth and Fifth Amendments. Shortly thereafter, pursuant to its counterclaim, Mosher filed a subpoena *duces tecum* to take the

[1]Mosher's belief stems from numerous inspections and attempted inspections of its other company plants, as well as the testimony and representations of OSHA officials that only a very small percentage of employers are even considered for programmed OSHA inspections, and that all other companies — including many of Mosher's competitors — are *de facto* exempted from enforcement.

deposition of the OSHA supervisor responsible for scheduling the inspection of Mosher under the plan, and to produce certain OSHA documents relating to the design and operation of the plan.[2] The Secretary answered Mosher's counterclaim and admitted the existence of a justiciable controversy. However, the Secretary moved to quash the subpoena duces tecum served on the OSHA supervisor, and sought a protective order that such discovery not be had, contending that Mosher could not engage in discovery into the design and operation of the inspection plan because such discovery was beyond the "four corners" of the warrant application. In turn, Mosher moved under F.R.C.P. 37(a) to compel discovery into the inspection plan, contending that its constitutional challenge to the plan would be effectively foreclosed if discovery was denied.

On November 2, 1983, the district court denied the Secretary's motion to quash and for a protective order, and ordered the Secretary to comply with Mosher's discovery requests on or before November 14, 1983. Rather than comply with the court's discovery order, the Secretary made an about-face and sought to amend his answer to Mosher's counterclaim to deny the existence of a justiciable controversy. The Secretary then moved to dismiss Mosher's counterclaim for lack of jurisdiction, arguing that discovery pursuant to the counterclaim was not permissible because there was no jurisdiction for the counterclaim.

On May 23, 1984, the district court entered an order and memorandum opinion ruling that it did have jurisdiction over Mosher's counterclaim. (See App. *infra*).The district court noted that under *Baldwin Metals Company, Inc. v.*

[2]Estimates before the district court were that the desired discovery would take one-half day, and any documents that were confidential could be covered by protective order.

Donovan, 642 F.2d 768 (5th Cir., 1981) there was no other procedure by which Mosher could be assured of a judicial hearing on the validity of OSHA's inspection plan. Since the plan had not been promulgated pursuant to the notice and comment rulemaking procedure of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*, Mosher had no opportunity for judicial review of the plan under 5 U.S.C. §§ 702 and 706. If Mosher permitted the inspection pursuant to an improper warrant it would not only suffer the irreparable loss of its constitutional rights, it would be subject to the administrative exhaustion requirements of *Baldwin Metals*, and thereby allow the Secretary complete control over whether there would be *any* forum in which Mosher could raise its constitutional challenges to the inspection plan.[3] Moreover, if Mosher were to challenge the plan in a separate proceeding apart from the warrant enforcement action the Secretary would contend that there was no justiciable controversy. The district court therefore held that Mosher must be allowed to bring its counterclaim; otherwise the Secretary could "avoid judicial scrutiny of the inspection plan by the device of a narrowly drafted contempt petition." (App. C, *infra.*)

The Secretary sought an interlocutory appeal of the district court's order under 28 U.S.C. § 1292(b), which was denied by the U.S. Court of Appeals for the Eleventh Circuit. The district court once again ordered the Secretary to comply with its discovery order, but the Secretary refused to do so. The court thereupon imposed discovery sanctions under Rule 37(b)(2) and dismissed the Secretary's petition for adjudication in civil contempt, entered judgment by

[3]The Secretary can foreclose any administrative hearing and subsequent appeal to the Court of Appeals by simply declining to issue any citations. *See, B. B. Anderson Construction Co. Inc. v. Donovan*, No. 81-1742, (not officially reported) 11 BNA OSHC 1489, 1491 (10th Cir., 1983), and cases cited therein.

default on Mosher's counterclaim, quashed the inspection warrant, enjoined further inspection attempts based on the same inspection plan, and awarded Mosher its costs and attorney's fees incurred because of the Secretary's failure to comply with the court's discovery orders. The Secretary of Labor appealed that judgment to the Court of Appeals for the Eleventh Circuit.

On June 25, 1986, a divided panel of the Eleventh Circuit reversed the district court. The majority held that Mosher was not entitled to go beyond the "four corners" of the warrant affidavit in order to challenge the fairness of the underlying inspection plan unless Mosher could first show that the Secretary's representatives had made false statements in the affidavit for the warrant, as required by *Franks v. Delaware,* 438 U.S. 154 (1978). Judge Tuttle dissented on the grounds that the considerations underlying *Franks* do not apply where an agency's entire regulatory inspection plan is challenged, and that application of the four corners doctrine would preclude full judicial review of the reasonableness of OSHA's inspection plan thus seriously undermining this Court's decision in *Marshall v. Barlow's, Inc.,* 436 U.S. 307 (1978).

Mosher timely moved the Eleventh Circuit for *en banc* suggestion and rehearing, but the motion was denied on July 30, 1986.

REASONS THE WRIT SHOULD BE GRANTED

In *Franks v. Delaware,* 438 U.S. 154 (1978), this Court restricted the circumstances under which a criminal defendant could, in a post search proceeding, challenge the truthfulness of factual statements made in an affidavit supporting the search warrant.

The Appeals Court majority below applied *Franks* to administrative regulatory searches to preclude a presearch declaratory judgment action challenging the fairness and constitutional reasonableness of the administrative plan for conducting programmed inspections under the Occupational Safety and Health Act. The majority's decision conflicts with and substantially undermines *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978), *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. Seattle*, 387 U.S. 541 (1967), where this Court held that a regulatory agency's inspection plan must be reasonable under the Constitution before the right of privacy must yield to the right of search.

The majority's decision below also directly conflicts with at least one state court of last resort interpreting and applying *Barlow's, Camara* and *See* to OSHA searches. *See, Mosher Steel-Virginia v. Teig* 327 S.E.2d 87 (Va. 1985).

In the seminal case of *Camara v. Municipal Court, supra* the Court applied the warrant requirements of the Fourth Amendment to administrative, regulatory inspections. There the Court reminded that the basic purpose of the Fourth Amendment "is to safeguard privacy and security against arbitrary invasions by governmental officials." 387 U.S. at 528. The Court noted that health officials would not necessarily show the same kind of probable cause to a magistrate to obtain an administrative warrant as would a police officer searching for the fruits or instrumentalities of crime. 387 U.S. at 538. Rather, the Court concluded that in the absence of specific knowledge of an existing violation, probable cause to issue an administrative warrant to inspect could be based on "reasonable legislative or administrative standards" for conducting a particular inspection. 387 U.S. at 538. The Court reiterated, however, that "reasonableness is still the ultimate standard." 387 U.S. at 539. The holding

in *Camara* was extended to commercial establishments in the companion case of *See v. City of Seattle, supra.*

In *Marshall v. Barlow's, Inc., supra,* the Court reaffirmed its earlier holdings in *Camara* and *See,* and held that warrants were required for administrative inspections under the Occupational Safety and Health Act. In *Barlow's* the Court also elaborated on the probable cause showing required for an administrative inspection warrant. The Court stated that in order to obtain a warrant to conduct an OSHA inspection the Secretary of Labor must show either (1) specific evidence of an existing violation; or (2) that "'reasonable legislative standards for conducting an ... inspection are satisfied with respect to a particular [establishment].'" *Barlow's* at 320, quoting *Camara v. Municipal Court,* 387 U.S. at 538. Thus, under *Barlow's* first test, when the Secretary receives an employee complaint of an existing workplace hazard he is able to present specific evidence, or at least a suspicion of an actual violation of law, in order to obtain a warrant. *Barlow's* second test, however, is directed toward inspections that are scheduled on the basis of a general OSHA selection plan. For these latter, "programmed" inspections, no violation of law is proven or even alleged. Therefore, in issuing a warrant for a programmed inspection, a court must determine that the inspection is "reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria." *Barlow's* at 323.

Since *Barlow's,* the Secretary has developed a number of administrative plans for scheduling programmed OSHA inspections. In practice, when the Secretary applies for a warrant to conduct a programmed OSHA inspection he simply attaches a copy of his inspection plan to the warrant application. The plan states in general terms that industries

are classified and selected for inspection based on the accident rate for the entire industry, or the potential use of or exposure to hazardous substances in that industry. On its face, such a showing appears to satisfy *Barlow's* requirement that the plan contain specific neutral criteria. The fact that the plan contains specific neutral criteria, however, is not sufficient, in and of itself, to establish that the plan is *reasonable* under the Constitution. For instance, there is no description of how employers are categorized into a particular industry group. None of the underlying industry or establishment lists are provided so there is no way to determine whether all businesses are subject to being inspected, or how often, or even whether all businesses in the same industrial classification are subject to being inspected. Indeed, the Secretary maintains that these (and other) underlying documents are not subject to review by the courts! It is the Secretary's position that since these underlying documents are beyond the four corners of his warrant application they are secret, and need never be disclosed unless an employer demonstrates that the government's affidavit on which the warrant is based contains deliberate falsehoods or instances of reckless disregard for the truth, as required by *Franks v. Delaware, supra.*

Obviously, the Secretary's inspection plan is not reasonable, and cannot pass constitutional muster if it selectively enforces the Act against only a few businesses, and excludes the great majority. The few are subjected to repeated, arbitrary invasions of their privacy and security by government officials — the very evil proscribed by *Camara, See* and *Barlow's.* Moreover, their operations are disrupted and they are placed at a competitive disadvantage. Thus, Judge Tuttle in his dissent below emphasized that "a mere surface examination of the plan may not insure that the plan in its

development and actual operation has been conducted in the 'reasonable' and 'neutral' manner" requi ed by *Barlow's*. Rather, Judge Tuttle reasoned:

> In order to fulfill this responsibility, a court must not only be allowed to review an administrative search plan on its face, but must also be granted full authority to examine the facts presaging the formulation and operation of the plan if they are not included as a part of the affidavit to ensure that it meets constitutional and statutory muster as required by the Supreme Court.

791 F.2d at 1540.

Judge Tuttle believed that meaningful review of the plan can only be accomplished by allowing full and free discovery. The majority, on the other hand, held that *Franks v. Delaware* precludes discovery beyond the four corners of the warrant affidavit. In so holding, the majority cuts off any meaningful judicial review of the reasonableness of the plan, and thus conflicts with *Barlow's*. The majority's decision also directly conflicts with a state court of last resort involving this same company. In *Mosher Steel-Virginia v. Eva S. Teig, Commissioner of Labor*, 327 S.E.2d 87 (Va. 1985) the Supreme Court of Virginia agreed, as did Judge Tuttle, that *Franks* logically applied when a warrant for an OSHA inspection is based on an affidavit alleging specific violations. However, the Virginia Supreme Court concluded that where there is no allegation of a specific violation or imminent danger, and the application for a warrant is based on a general inspection plan, the considerations underlying *Franks* are not present.

> We hold that an employer need not make a *Franks* showing to contest the validity of a warrant and its underlying plan for a general inspection by adducing evidence beyond the limits of the supporting

> affidavit. An employer who challenges the plan on which the general inspection warrant is based is entitled to seek a presearch declaratory judgment to determine the constitutional validity of the plan. We acknowledge that this holding may result in frustrating delays in the enforcement of occupational safety and health laws, but the constitutional principle at stake is of overriding importance.

327 S.E.2d at 92.

Guidance is needed from this Court to resolve the conflict. Surely, *Franks v. Delaware* does not apply automatically to preclude discovery in administrative warrant cases where there is no contention that a violation of law exists. The considerations underlying *Franks* are entirely different; there is no logical or just reason for applying *Franks* to a warrant issued merely on the basis of an OSHA selection plan. Yet with the decision below in this case, the Circuit Courts of Appeals are on the verge of establishing a rule of law that will absolutely and totally prohibit employers from ever challenging the fairness and the constitutional reasonableness of the inspection plan by which the Occupational Safety and Health Act is enforced. If employers cannot seek judicial review of the fairness of the plan under the Administrative Procedure Act when the plan is first promulgated,[3] and if they are prohibited from discovery and meaningful judicial review of the reasonableness of the plan when it is enforced against them, then *Barlow's, Camara* and *See* will

[3] *See, e.g. United States Department of Labor v. Kast Metals Corp.* 744 F.2d 1145 (5th Cir. 1984).

be nullified as a practical matter, and the magistrate will become nothing more than a rubber stamp for enforcement officials.[4]

CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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[4]In his treatise on the Fourth Amendment, Professor Wayne La Fave notes that in an *ex parte* warrant application the magistrate cannot realistically consider whether the underlying inspection plan is arbitrary. He points out:

"... in the absence of judicial scrutiny of the plan itself ... arbitrary inspections might still occur because the plan itself is arbitrary." Thus, "the fact a warrant was obtained should not be deemed to foreclose later challenge ... of the reasonableness of the plan under which the warrant was obtained." La Fave, *Search and Seizure, a Treatise on the Fourth Amendment*, § 10.2 pp. 224-226.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September 1986, three copies of this Petition for Writ of Certiorari were placed in the United States Mail, certified, return receipt requested, postage prepaid, to counsel for all parties required to be served, said parties being the Solicitor General, Department of Justice, Washington, D.C. 20530, and Andrea Casson, U.S. Department of Labor, Room S 4004, Washington, D.C. 20210.

ROBERT E. RADER, JR.
Counsel for Petitioners

APPENDIX A

Raymond J. DONOVAN, Secretary of Labor, United States Department of Labor, Plaintiff-Appellant,

v.

MOSHER STEEL COMPANY, DIVISION OF TRINITY INDUSTRIES, and Roger Love, Plant Manager, Defendants-Appellees.

No. 85-7210.

United States Court of Appeals,
Eleventh Circuit.

June 25, 1986.

Appeal from the United States District Court for the Northern District of Alabama.

Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge, and TUTTLE, Senior Circuit Judge.

JOHNSON, Circuit Judge:

This case requires us to review the district court's dismissal, as a discovery sanction, of a civil contempt complaint filed by the Secretary of Labor against Mosher Steel Company, a Birmingham, Alabama, manufacturer. We hold that the district court abused its discretion in ordering discovery, and therefore we VACATE the discovery sanctions imposed by the district court and REMAND for a decision on the merits of the Secretary's contempt complaint and Mosher Steel's motion to quash the inspection warrant. We instruct the district court to dismiss Mosher Steel's counterclaim.

I

On August 16, 1983, a federal magistrate issued a warrant authorizing the Occupation Safety & Health Administration

(OSHA) to inspect the worksite at Mosher Steel's Birmingham plant, which manufactures fabricated structural steel. The warrant was not based on a complaint, but was issued pursuant to an OSHA plan of programmed inspection. The Supreme Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978) ruled that warrantless OSHA inspections are unconstitutional, but permitted the Secretary of Labor to establish administrative probable cause for a warrant on a showing that " 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' " *Id.* at 320, 98 S.Ct. at 1824, quoting *Camara v. Municipal Court*, 387 U.S. 523, 538, 87 S.Ct. 1727, 1736, 18 L.Ed.2d 930 (1967).

Mosher Steel refused to honor the inspection warrant. OSHA thereupon petitioned the district court to hold Mosher in civil contempt. In response, Mosher filed an answer contesting the validity of the warrant and a counterclaim for declaratory judgment alleging, inter alia, that OSHA's administrative inspection plan itself was unreasonable and discriminatory in violation of the fourth and fifth amendments. Mosher further sought a subpoena duces tecum to depose the OSHA supervisor and to order production of certain OSHA documents relating to the plan.

OSHA moved to quash the latter subpoena and asked the district court for a protective order, arguing that Mosher could not engage in discovery beyond the "four corners" of the warrant application. Mosher responded with a motion to compel discovery under Fed.R.Civ.P. 37(a). The district court decided in Mosher's favor, ordering discovery and thereafter denying OSHA's motion to stay discovery and to dismiss the counterclaim.

OSHA asked the district court to certify the discovery and warrant issues for interlocutory appeal. The lower court granted the request, but this Court denied the petition in October 1984. The district court then once again ordered OSHA to comply with its discovery order, and once again OSHA refused. The court thereupon imposed discovery

sanctions under Rule 37(b)(2) — dismissing the contempt action with prejudice, entering judgment by default on Mosher's counterclaim, quashing the inspection warrant, enjoining further inspection of Mosher based on this administrative plan, and awarding Mosher costs and attorney's fees. The Secretary of Labor appeals this judgment.

II

We review the district court's dismissal of the contempt complaint, and its issuance of the underlying discovery order, under the abuse of discretion standard. Although dismissal is a severe sanction, imposition of sanctions for failure to provide discovery rests within the trial court's discretion and will not be overturned absent abuse of that discretion. *U.S. v. $239,500 in U.S. Currency*, 764 F.2d 771, 773 (11th Cir.1985). Appeal of an order imposing sanctions necessarily includes a review of the underlying discovery order. *Hastings v. North East Ind. School Dist.*, 615 F.2d 628, 631 (5th Cir.1980). The district court's discovery order is also reviewable only for abuse of discretion. *American Key Corp. v. Cole Nat. Corp.*, 762 F.2d 1569, 1571 (11th Cir.1985). We conclude that here the district court abused its discretion in ordering discovery, and in awarding sanctions based on Mosher's [sic] [the secretary's] failure to comply with the improper discovery order.

The district court had no power to order discovery beyond the so-called "four corners" of the warrant application. The four corners rule is a well-established precept of judicial review. It derives from the observation of the Supreme Court, in *Aguilar v. Texas*, 378 U.S. 108, 109 n. 1, 84 S.Ct. 1509, 1511 n. 1, 12 L.Ed.2d 723 (1964), that "[i]t is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention" — that is, within the four corners of the warrant application.

The four corners rule logically applies to all warrants, criminal or administrative. In either case the reviewing court is charged with examining the magistrate's actual

probable cause determination — not what he or she might have concluded based on information not presented in the warrant application. (The magistrate, of course, is not limited in what he or she may consider in the first instance.) This Court has acknowledged the broad scope of the rule:

> The standards for reviewing a magistrate's finding of probable cause are the same for both administrative and criminal warrants. In passing on the validity of a warrant, the role of the reviewing court is limited. . . . [J]udicial review of the sufficiency of an affidavit for the issuance of a warrant must be strictly confined to the information brought to the magistrate's attention.

West Point Pepperell, Inc. v. Donovan, 689 F.2d 950, 959 (11th Cir.1982) (warrant based on complaint) (citations omitted). *See also id.* at 960 n. 12; *Brock v. Gretna Machine & Ironworks, Inc.,* 769 F.2d 1110, 1114 (5th Cir.1985) (warrant based on inspection plan) ("[i]n determining the validity of the warrant we will look no further than the application itself, including any attachments and exhibits, and any sworn testimony given in conjunction therewith").[1]

Mosher Steel seeks to circumvent the four corners rule by characterizing its counterclaim as an attack on the administrative *plan* underlying the OSHA inspection warrant — rather than as a challenge to the warrant itself — so that it may request broad discovery about that plan. Appellee's implication is that the plan is somehow separable from the warrant application and may be independently attacked in a proceeding to enforce the warrant. We are unpersuaded by this argument.

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[1]The Supreme Court has carved out a single narrow exception to this rule in *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), which permits a reviewing court — on a "substantial preliminary showing" by the party bringing the warrant challenge — to hold an evidentiary hearing to determine the truthfulness of facts presented to the magistrate. No *Franks* claim is raised here. Except in a *Franks* situation, "a reviewing court should not conduct a probable cause hearing in which it considers evidence not presented to the magistrate." *West Point Pepperell, supra,* at 959.

The magistrate's probable cause determination in issuing an administrative warrant necessarily includes a review of the inspection plan on which the search is to be based. The Supreme Court in *Barlow's* expressly contemplated that "[a] warrant . . . would provide assurances from a neutral officer that the inspection is reasonable under the Constitution, is authorized by statute, and *is pursuant to an administrative plan containing specific neutral criteria.*" *Barlow's, supra,* at 323, 98 S.Ct. at 1825 (emphasis added). The information presented to the magistrate unquestionably must be sufficient to satisfy that officer that he or she can properly assess the plan's neutrality. *Cf. Gretna, supra,* at 1113. If this information is not sufficient, then the remedy is not to permit broad discovery beyond the scope of the warrant application by the employer on review — it is for the magistrate to deny the warrant in the first instance.

Nowhere does *Barlow's,* or the law of this Circuit, require the Secretary to disclose information about its inspection plan beyond that necessary to satisfy the magistrate that the plan is neutrally-based. Mosher sought, for example, to inquire into the daily logs or worksheets of OSHA compliance officers and to discover documents and data supporting but not included in certain warrant affidavits. To permit such a broad-based inquiry is simply to invite misuse of the warrant process mandated by the Supreme Court. In *Barlow's*, while the Court held that the Constitution required a warrant for OSHA inspections, it nevertheless permitted that warrant to issue *ex parte* and acknowledged its concern about resistance and delay. *Barlow's, supra,* at 316; 316–17 n. 11; and 320 n. 15, 98 S.Ct. at 1822; 1822 n. 11; and 1824 n. 15. The district court had no authority to conduct the time-consuming and exhaustive hearing that Mosher sought.[2] We thus agree with the Tenth Circuit's observation,

[2]The Supreme Court in *Barlow's,* although "unconvinced . . . that requiring warrants to inspect will impose serious burdens on the inspection system or the courts . . ." noted that the warrant requirement "might have an impact on whether owners choose to resist requested searches; we can only await the development of evidence not present on this record to determine how serious an impediment to effective enforcement this might be." *Barlow's, supra,* at 316–17 n. 11, 98 S.Ct. at 1822 n. 11. We are

when it considered and denied a similar discovery request in *Donovan v. Hackney, Inc.*, 769 F.2d 650 (10th Cir.1985), *cert. denied sub nom. Hackney, Inc. v. Brock*, — U.S. —, 106 S.Ct. 1458, 89 L.Ed.2d 715 (1966):

> We do not believe that *Marshall v. Barlow's* . . . envisions the expanded evidentiary inquiry here sought by [the employer] in its efforts to resist an inspection of its plant; an inspection, incidentally, which is itself limited and subject to restrictions as set forth by the magistrate in his order. Rather, *Barlow's*, in our view, suggests that inspection warrants, which are required under that opinion, are to be issued *ex parte* and "executed without delay and without prior notice. . . ."

Id. at 653 (citations omitted).[3]

In sum, we are satisfied that the administrative warrant process set out by the Supreme Court for OSHA inspections sufficiently protects appellee's constitutional rights and appropriately limits the discretion of administrative officials. *See Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1067 (11th Cir. 1982). We decline to expand or to go beyond

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persuaded that, given the general acceptance of the so-called "worst-first" inspection plan followed by the Secretary, *see Donovan v. Hackney, Inc.*, 583 F.Supp. 773, 779 (W.D.Ok.1984); *aff'd, Hackney, supra; Donovan v. Wollaston*, 695 F.2d 1, 5 (1st Cir.1982), Mosher's tactic may be calculated as one such deliberate impediment to enforcement. Cases with markedly similar facts such as *Gretna, supra*, and *Hackney, supra*, suggest that resistance to a search, coupled with a counterclaim and request for discovery on the inspection plan in the subsequent contempt proceedings, is the latest "stop OSHA" strategy.

[3]*See also Marshall v. Milwaukee Boiler Mfg. Co., Inc.*, 626 F.2d 1339, 1345–46 (7th Cir.1980) (citations omitted):

> [W]e cannot agree with the Company that an application need be accompanied by all of the supporting documents, or indeed any of them, upon which the factual assertions of the application are based. . . . [T]he agency is not required to make a massive evidentiary showing of particularized cause and a simple warrant request hearing should not be turned into a full-blown hearing. We continue to decline "imposing on the Secretary an unwanted consumption of enforcement energies" which would "exceed manageable proportions."

that process. Since we decide in favor of the Secretary on this issue, we need not consider the latter's Administrative Procedure Act and prosecutorial discretion arguments. We hold that the district court abused its discretion in authorizing discovery beyond the four courners of the warrant application in this case. We therefore VACATE the court's award of Rule 37 sanctions based on OSHA's refusal to comply with the improper discovery order. Further, we instruct the district court to dismiss the counterclaim.

Since neither the Secretary's contempt claim nor Mosher Steel's motion to quash the warrant for lack of probable cause have been decided on the merits, we REMAND for the lower court's review of the sufficiency of the warrant itself within the bounds of the warrant application.

TUTTLE, Senior Circuit Judge, dissenting

With deference, I dissent. I disagree with the premise of the majority's approach to the problem before us. I believe that it is neither wise nor correct under the standards enunciated by the Supreme Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816, 56 L.Ed.2d 305 (1978), to apply the so-called "four corners rule" to a review of an OSHA search warrant requested not on the basis of specific allegations of safety violations, but merely by the operation of a self-styled "neutral" selection plan.

In *Marshall v. Barlow's, Inc., supra,* the Supreme Court ruled unconstitutional non-consensual, warrantless OSHA on-site inspections. In order to obtain a warrant, the Court required the Secretary of Labor to meet a bifurcated standard for administrative probable cause by showing either (1) specific evidence of an existing violation of the Act; or (2) that " 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Barlow's* at 320, 98 S.Ct. at 1824, quoting *Camera v. Municipal Court,* 387 U.S. 523, 538, 87 S.Ct. 1727, 1736, 18 L.Ed.2d 930 (1967)). *See West Point Pepperell, Inc. v. Donovan,* 689 F.2d 950, 957 (11th Cir.1982); *United States v. Mississippi Power & Light Co.,* 638 F.2d 899,

907 (5th Cir.1981); *Matter of Northwest Airlines, Inc.*, 587 F.2d 12, 14 (7th Cir.1978). In the present case OSHA, through use of a nationwide administrative selection inspection plan, sought to inspect the Mosher Steel plant in Birmingham, Alabama. Because there was no evidence of any existing OSHA violation at the plant, the OSHA representative in seeking the inspection warrant, simply presented a U.S. magistrate with a copy of the plan itself under which the inspection was required and a description of how Mosher was selected for review.[1] On the basis of this plan, the magistrate issued the warrant.

Appellant Secretary argues on appeal that in its hearing to enforce the search warrant the district court's discovery order compelling the Secretary to produce certain documents regarding the administrative inspection plan and to produce an official of the Department for deposition was in error because any inquiry into the appropriateness of the warrant itself was limited solely to information presented to the magistrate on the face of the affidavit. Under the "four corners" standard laid out by the Supreme Court in *Aguilar v. Texas*, 378 U.S. 108, 109 n. 1, 84 S.Ct. 1509, 1511 n. 1, 12 L.Ed.2d 723 (1964), and clarified by its decision in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), review of *criminal* warrants is generally limited to the evidence which was presented to the issuing magistrate. The sole exception is when the challenging party alleges and demonstrates that the government's affidavit on which the warrant is based contains deliberate falsehoods or instances of reckless disregard for the truth. *Franks* at 171, 98 S.Ct. at 2684. According to the Secretary, the *Franks* standard applies not only to review of criminal warrants, but to OSHA administrative inspection warrant challenges as well. In light of this approach, because no evidence was presented by appellee Mosher to suggest any deliberate falsehoods in the government's application for a warrant, review was thus limited to the "four corners of the adminis-

[1]There was nothing in the description to indicate that Mosher was randomly selected for inspection, only the Secretary's statement that the selection procedure was naturally administered.

trative plan" itself which was the basis of the warrant and not the process by which the plan was formulated, thus making the district court's discovery order inappropriate. The Secretary suggests that on its face, the inspection plan is perfectly acceptable — that it was promulgated in an appropriate fashion and is legitimate in scope and non-discriminatory in application. He also argues that to allow discovery here would seriously hinder the operation of the entire inspection system and frustrate the agency's efforts to insure that congressionally mandated health and safety requirements are met. The appellant suggests that a magistrate's facial review of the plan itself is appropriate to insure that Fourth Amendment concerns are addressed. I disagree.

In establishing a bifurcated test for determining when a warrant may be issued for an OSHA administrative search, the Supreme Court distinguished between those searches which were the result of "specific evidence of an existing violation." *Barlow's*, 436 U.S. at 320, 98 S.Ct. at 1824, and those which resulted from the operation of a generalized administrative inspection plan. The Court mandated that a warrant for the latter-type search be granted only after it had been demonstrated that " 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied.' " *Id.* In issuing such a warrant, a court must determine that the inspection is *"reasonable under the Constitution, is authorized by statute,* and *is pursuant to an administrative plan containing specific neutral criteria."* (Emphasis added). *Id.* at 323, 98 S.Ct. at 1825. In order to fulfill this responsibility, a court must not only be allowed to review an administrative search plan on its face, but must also be granted full authority to examine the facts presaging the formulation and operation of the plan if they are not included as a part of the affidavit to ensure that it meets constitutional and statutory muster as required by the Supreme Court. Such may be accomplished only by allowing the parties challenging such warrants full and free discovery into the nature of the selection plan itself. A mere surface examination of the plan may not insure that the plan in its development and actual operation has been conducted in

the "reasonable" and "neutral" manner required by the Supreme Court. The Court, advocating a contrary view, points to language in a recent Fifth Circuit opinion, *Brock v. Gretna Machine & Iron Works, Inc.*, 769 F.2d 1110 (5th Cir.1985), an OSHA inspection warrant challenge similar to the situation presently before us. There the Court, after invalidating the proposed OSHA search because of an improper warrant application, in *dictum*, suggested that in reviewing the adequacy of an OSHA inspection selection plan, a court "is neither obliged nor authorized to inquire into the facts presaging the formulation of the plan." *Id.* at 1113. I believe this conclusion inadequately addresses those concerns expressed by the Supreme Court in *Barlow's* and would decline to adopt it.

Although this Court has ruled that the Supreme Court's *Franks* "four corners" standard applies to challenges of OSHA inspection warrants issued following the presentation of specific evidence of an existing violation, *West Point-Pepperell v. Donovan*, 689 F.2d 950, 959 (11th Cir. 1982), I believe it judicially unsound to extend this rule to a review of a warrant granted on the basis of an administrative selection plan. There is a fundamental difference between these two types of inspection warrants. The former bears close relation to a criminal warrant issued as the result of suspicion of an actual violation of law. It is to be granted after *specific evidence* of a violation has been presented to a magistrate. *Barlow's*, 436 U.S. at 320, 98 S.Ct. at 1824. The parallel between it and the criminal warrant for which *Franks* was designed to apply is so pronounced that the application of the *Franks* standard to it is both logical and just. The same may not be said, however, for the warrant issued merely on the basis of an OSHA selection plan. No violation of law has been proven or even alleged. This is an entirely different type of warrant and the similarities to a *Franks* type situation are virtually non-existent. It is imperative that the process by which businesses are selected for non-complaint inspired searches be truly random and neutral. *See Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1068 (11th Cir.1982). A selection process that lacks

this neutrality is inherently discriminatory and so invidious and destructive of public confidence in government that a court cannot sanction its existence by the casual issuance of a warrant for its enforcement. Therefore, in a Fourth Amendment challenge of an OSHA inspection warrant issued as the result of an administrative selection plan. I believe that the *Aguilar* and *Franks* discover limitations are not applicable.

Although the Seventh Circuit in *Marshall v. Milwaukee Boiler Manufacturing Co., Inc.*, 626 F.2d 1339, 1346 (7th Cir. 1980) and the Tenth Circuit in *Donovan v. Hackney*, 769 F.2d 650 (10th Cir.1985), *cert. denied, sub. nom., Heickney, Inc. v. Brock*, ____ U.S. ____. 106 S.Ct. 1458, 89 L.Ed.2d 715 (1986).[2] have extended the *Franks* rule to such challenges. I disagree for the reasons outlined above. In fact, I believe that the Tenth Circuit was particularly misguided in the very basis of its opinion. It found significance in the fact that the inspection to be carried out was of a commercial establishment rather than a private residence, noting that "the intrusion here is relatively minimal; this is an *inspection* of a *workplace* where employees freely enter, not a search of a private residence." *Id.* at 653. This statement ignores the entire introduction and, in fact, legal underpinnings of the *Barlow's* opinion. The Supreme Court emphatically stated:

> The Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that Amendment, and the American colonial experience. An important forerunner of the first 10 Amendments to the United States Constitution, the Virginia Bill of Rights, specifically opposed "general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed." The general

[2]The Fifth Circuit in *dicta* contained within *Brock v. Gretna Machine & Iron Works, Inc.*, 769 F.2d 1110, 1114 (5th Cir.1985), reaches the same conclusion.

> warrant was a recurring point of contention in the Colonies immediately preceding the Revolution. The particular offensiveness it engendered was acutely felt by the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures that most irritated the colonists. "[T]he Fourth Amendment's commands grew in large measure out of the colonists' experience with the writs of assistance . . . [that] granted sweeping power to customs officials and other agents of the King to search at large for smuggled goods." *United States v. Chadwick,* 433 U.S. 1, 7-8 [97 S.Ct. 2476, 2481, 53 L.Ed.2d 538] (1977). See also *G.M. Leasing Corp. v. United States,* 429 U.S. 338, 355 [97 S.Ct. 619, 630, 50 L.Ed.2d 530] (1977). Against this background, it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence.

Barlow's, supra, 436 U.S. at 311, 312, 98 S.Ct. at 1819-20. In suggesting that a commercial building has less protection from an unreasonable search than a private one, the Tenth Circuit has seriously undermined the persuasiveness of its opinion.

I would, therefore, affirm the judgment of the district court.

APPENDIX B

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

NO. 85-7210

D. C. Docket No. 83-2173

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,

Plaintiff-Appellant,

v.

MOSHER STEEL COMPANY, DIVISION OF TRINITY INDUSTRIES, AND ROGER LOVE, Plant Manager,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

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Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge, and TUTTLE, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, VACATED; and that this cause be and the same is hereby, REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

TUTTLE, Senior Circuit Judge, dissented and filed an opinion.

Entered: June 25, 1986
For the Court: Miguel J. Cortez, Clerk

By: /s/ WARREN A. GODFREY
Deputy Clerk

ISSUED AS MANDATE: August 12, 1986

APPENDIX C

U. S. COURT OF APPEALS
ELEVENTH CIRCUIT
F I L E D
July. 30, 1986
Miquel J. Cortez, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7210

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,

Plaintiff-Appellant,

v.

MOSHER STEEL COMPANY, DIVISION OF TRINITY INDUSTRIES, AND ROGER LOVE, Plant Manager,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 25, 11 Cir., 1986, ____ F.2d. ____).
(July 30, 1986)

Before GODBOLD, Chief Judge, JOHNSON, Circuit Judge and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
F I L E D
May. 23, 1984
James E. Vandergrift, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CIVIL ACTION NO. 83-G-2173-S

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor,

Plaintiff,

v.

MOSHER STEEL COMPANY, DIVISION OF TRINITY INDUSTRIES, AND ROGER LOVE, Plant Manager,

Defendants.

MEMORANDUM OPINION

In this OSHA (Occupational Safety and Health Administration) case, the Secretary of Labor (Secretary) requests dismissal of the counterclaim filed by defendant Mosher Steel Company (Mosher), which seeks an adjudication of the validity of the inspection warrant issued to it and of the OSHA plan for determining which businesses will be inspected for OSHA violations. The Secretary argues that a counterclaim may not be properly raised in a civil contempt proceeding, and that this court lacks equitable jurisdiction to hear this claim.

This action was initiated to enforce an OSHA inspection warrant against Mosher through the filing of a petition to have the company adjudicated in civil contempt. Previously, OSHA agents having a valid inspection warrant were denied admission to the plant. In its answer to the petition, Mosher denies the validity of the warrant. Mosher also filed a

counterclaim, alleging that OSHA's entire administrative inspection plan is unreasonable and discriminatory in design and application, and violates the company's right of privacy and to be free from unreasonable searches.

Counterclaims: Civil Contempt Proceedings

The first question raised concerns the propriety of allowing a counterclaim in a civil contempt proceeding. The Secretary notes that Rule 13 of the Federal Rules of Civil Procedure provides that counterclaims can only be raised in response to a pleading, and that a petition for civil contempt is a motion within the meaning of Rule 7(b)(1). *See also Latrobe Steel Co. v. United Steelworkers of America,* 545 F.2d 1336, 1343-44 (3d Cir. 1976); *S.E.C. v. VTR, Inc.,* 410 F. Supp. 1309, 1313 (D.D.C. 1975). Accordingly, it is argued that Mosher's response to the contempt petition is a response to a motion but not to a pleading. It is therefore argued that Mosher cannot interpose its counterclaim in this proceeding.

The Secretary also advances the argument that the filing of a civil contempt petition should not be regarded as the institution of a separate action, but instead should be viewed as part of a proceeding that commenced with the *ex parte* application for the inspection warrant before a magistrate. *Skinner v. White,* 505 F.2d 685, 689 (5th Cir. 1974); *Wirtz v. Ocala Gas Co.,* 336 F.2d 236, 243 (5th Cir. 1964). *But see Marshall v. Weyerhaeuser Company,* 456 F. Supp. 474, 477 (D.N.J. 1978). This proposition of law is supposedly consistent with the contention that the contempt petition is not a pleading.

Both arguments are misplaced. The Secretary concedes that there now exists a justiciable "case or controversy" that this court can resolve. That controversy did not exist when the *ex parte* application was made. It arose upon the filing of the petition for contempt. Only then was a legitimate issue presented that necessitated judicial intervention. Quite clearly, the filing of the contempt petition is, in substance, a complaint, to which an answer must be made and a counter-

claim is therefore proper. Moreover, this analysis also applies to the assertion that this proceeding is merely a facet of that which began before the magistrate. In part, this is true. However, in the cases relied upon by the Secretary, the parties there had been previously engaged in resolving an issue of law before the court when the contempt petition was filed; thus the petition was filed to enforce an order that arose out of a previous dispute between the litigants.

Neither of those factors is present here. The present parties have not been previously before this court, nor is the petition seeking to enforce an order that arose out of a prior controversy. This is the first time in this matter that the parties have had the opportunity to present their opposing views. There was no prior proceeding where such an opportunity was present. The contempt petition, therefore, is clearly not a continuation of an earlier proceeding at which the parties proffered their contentions, because no such proceeding existed. Mosher is clearly entitled to present its counterclaim. *See In the Matter of Establishment Inspection of Kast Metals Corp.*, ____ F. Supp. ____, 11 BNA OSHC 1266 (W.D. La. 1983); *Donovan v. Weyerhaeuser Co.*, 456 F. Supp. 474, 476 (D.N.J. 1978).

Equitable Jurisdiction

Even if the counterclaim is properly before the court, the Secretary contends that the court lacks equitable jurisdiction over said claim. Both parties agree that the Fifth Circuit's decision in *Baldwin Metals Co., Inc. v. Donovan*, 642 F.2d 768 (5th Cir. 1981), is controlling. In deciding whether to exercise equitable jurisdiction on claims nearly identical with that present here, the court stated:

> Before a court should exercise this equitable jurisdiction, it should carefully weight the danger of an irreparable injury, the existence of a callous disregard of constitutional rights, and the possibility of an inadequate remedy at law.

Baldwin Metals, supra, 642 F.2d at 775. That court declined jurisdiction because none of the dangers just mentioned were present. There, both of the consolidated cases were pending before the administrative resolution arm of OSHA, and both companies had already had their places of business inspected. An inadequate remedy at law was not present because the OSHA regulations provided for a direct appeal to the court of appeals of any unfavorable administrative decision. The appeals court could then rectify any constitutional deficiencies in the warrant and the inspection plan. Constitutional rights were not impinged because those rights had already been lost through the conducted search; therefore, the feared injury had already occurred.

The facts of this case warrant a different outcome. An inspection has not occurred; nor is there a guarantee of a judicial forum (absent this action) to resolve the alleged constitutional deficiencies in the warrant or the inspection plan. The possibility of a constitutional infringement and the inadequacy of a legal remedy are very much present. Even though discussing this latter factor in the context of administrative remedies, the *Baldwin Metals* court indeed recognized that a judicial determination on the warrant prior to its execution was proper:

> This analysis applies only when the allegedly unconstitutional search has already taken place, since the irreparable harm from the search cannot be undone by enjoining the use of its fruits. However, if a federal court is asked to consider the validity of a warrant prior to its execution — in a contempt proceeding, for example — exhaustion of remedies will not be appropriate, since the irreparable harm of the threatened unconstitutional search can be prevented prior to the warrant's execution. *E.g., Marshall v. Huffhines Steel Co.,* 488 F. Supp. 995 (N.D. Tex. 1979); *see Babcock & Wilcox, supra,* 610 F.2d at 1136.

Baldwin Metals, 642 F.2d at 774, n.13. This court is now being asked to prevent irreparable harm by foreclosing

execution of an improper warrant. It will heed that request if the warrant and the inspection are indeed improper.

Furthermore, the court has not weighed lightly the argument that the claim for declaratory relief should not extend to the inspection plan, but should be limited to matters raised in the contempt petition. Inherent in the petition, however, is the assumption that the plan under which this warrant was issued is valid. This assumption is not beyond attack, and should be subject to review. Cf. *Donovan v. Gretna Machine & Ironworks, Inc.* Docket No. 82-1507 (E.D. La. 1982). Doubtless, if the plan were challenged in a separate action, the Secretary would contend that a justiciable controversy is nonexistent, or that the present challenge, in essence, is a compulsory counterclaim that should have been adjudicated at this time. The warrant and plan are so entertwined with each other that review of both in the same proceeding is judicially economical and wise. The Secretary should not be allowed to avoid judicial scrutiny of the inspection plan by the device of a narrowly drafted contempt petition.

For the foregoing reasons, the motion to dismiss the counterclaim is due to be denied. An order consistent herewith will be entered.

DONE this 22nd day of May 1984.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

APPENDIX E

FILED
Jan. 18, 1985
United States District Court
Northern District of Alabama
James E. Vandegrift, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

CIVIL ACTION NO. 83-G-2173-S

ENTERED JAN. 18, 1985

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,

Plaintiff,

v.

MOSHER STEEL COMPANY, DIVISION OF TRINITY INDUSTRIES, AND ROGER LOVE, Plant Manager,

Defendants.

FINAL JUDGMENT ORDER

This cause is before the court upon motion for sanctions filed by defendant Mosher Steel Company. On August 16, 1983, a compliance officer with the Occupational Safety and Health Administration (OSHA) applied for and obtained a warrant to conduct an OSHA inspection of Mosher Steel Company's premises. The warrant was not based on a complaint or other specific evidence of any violations on Mosher's premises, but rather on OSHA's administrative plan for selecting businesses for programmed inspections.[1] OSHA served the warrant on Mosher on August 17. Mosher

[1]In Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978), the Supreme Court stated that the Secretary may obtain a warrant to conduct an OSHA inspection upon either specific evidence of an existing violation or a "showing that 'reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment.' " (Quoting Camara v. Municipal Court, 387 U.S. 523, 538, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).) 436 U.S. at 320-321.

did not permit the inspection on the grounds that the warrant itself did not establish probable cause, and that the administrative plan upon which it was based is unreasonable and discriminatory.

On September 14, 1983, the Secretary of Labor petitioned this court to hold Mosher and its plant manager in civil contempt for failure to comply with the warrant. Mosher answered the petition and denied the validity of the warrant. In addition, Mosher filed a counterclaim for declaratory judgment alleging that OSHA's entire administrative inspection plan is unreasonable and discriminatory in design and application, in violation of the fourth and fifth amendments. Shortly thereafter, pursuant to its counterclaim, Mosher filed a subpoena duces tecum to take the deposition of the OSHA supervisor responsible for scheduling the inspection of Mosher under the plan, and to produce certain OSHA documents relating to the design and operation of the plan. The Secretary answered Mosher's counterclaim and admitted the existence of a justiciable controversy. However, the Secretary moved to quash the subpoena duces tecum served on the OSHA supervisor, and for a protective order that such discovery not be had, contending that Mosher could not engage in discovery beyond the "four corners" of the warrant application. In turn, Mosher moved to compel discovery into the inspection plan, contending that its constitutional challenge to the plan would be effectively foreclosed if discovery was denied.

After briefing and argument, the court by order of November 2, 1983, denied the Secretary's motion to quash and for a protective order, and ordered the Secretary to comply with Mosher's discovery requests on or before November 14, 1983. Rather than complying with the court's discovery order, the Secretary made an about-face and sought to amend his answer to Mosher's counterclaim to deny the existence of a justiciable controversy. The Secretary then moved to dismiss Mosher's counterclaim for lack of jurisdiction, arguing that discovery pursuant to the counterclaim was not permissible because there was no jurisdiction for the counterclaim. Mosher responded that under

Baldwin Metals Company, Inc. v. Donovan, 642 F.2d 768 (5th Cir. 1981), its counterclaim was the correct and only procedure by which the company could preserve its constitutional rights and insure a judicial hearing on the alleged deficiencies in OSHA's inspection plan. After additional briefing and argument the court, on May 23, 1984, entered an order and memorandum opinion ruling that it did have jurisdiction over Mosher's counterclaim, and denied the Secretary's motion to dismiss.[2]

The Secretary's next attempt to avoid the ordered discovery was to seek an interlocutory appeal under 28 U.S.C. § 1292(b). Such appeal was denied by the Eleventh Circuit Court of Appeals on October 9, 1984. Once again, after more than a year of briefs and argument on the question of discovery, Mosher requested production of the documents and the deposition previously ordered by this court on November 2, 1983. However, the Secretary still refused to abide by the court's order and to permit discovery into OSHA's inspection plan. On November 9, 1984, in yet another "Response to Defendant's Subpoena Tecum" (at p. 6) plaintiff "respectfully decline[d] to make Mr. Lankford available for deposition or to produce any nonpublic documents listed in the subpoena." Consequently, on November 13, 1984, Mosher moved for sanctions pursuant to Rule 37(b). The motion for sanctions has been fully considered by this court and is ready for determination.

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[2]As the court noted in its May 23 order, Mosher has no other procedure by which it may insure a judicial hearing on the validity of OSHA's inspection plan. If Mosher permitted the inspection pursuant to an improper warrant it would not only suffer the irreparable loss of its constitutional rights, it would be subject to the administrative exhaustion requirements of Baldwin Metals, supra, and thereby allow the Secretary complete control over whether there would be any forum in which Mosher could raise its constitutional challenges to the inspection plan. (The Secretary can foreclose any administrative hearing by simply declining to issue any citations.) Moreover, if Mosher were to challenge the plan in a separate proceeding from this warrant enforcement action the Secretary would doubtless contend that a justiciable controversy is nonexistent. See *Donovan v. Gretna Machine & Ironworks, Inc.*, 100 F.R.D. 798, 800 (E.D. La. 1984).

Rule 37(b)(2) of the Federal Rules of Civil Procedure sets forth the sanctions available when a party fails to obey an order to provide or permit discovery. In addition to making "such orders in regard to the failure as are just," the rule authorizes this court to dismiss "the action or proceeding or any part thereof," to render "judgment by default against the disobedient party," to enter an order that "facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order," and to order payment of "the reasonable expenses, including attorney's fees, caused by the failure." The Secretary contends that the appropriate sanction is for this court to dismiss the whole proceeding. However, simple dismissal of the case will enable the Secretary to profit by his own recalcitrance, and will penalize Mosher by denying any opportunity for review of the inspection plan. Moreover, simple dismissal would not preclude the Secretary from attempting to inspect pursuant to another warrant based on the inspection plan, and to subject Mosher to this same time-consuming and expensive exercise again.

It is the opinion of the court that the Secretary's flagrant disregard of the rights of Mosher and the orders of the court in this case calls for extraordinary relief. When the Secretary comes before this court as a litigant he is subject to the Federal Rules of Civil Procedure and the orders of this court just as any other litigant. The Secretary's outright refusal to abide by the Federal Rules or the orders of this court forces the court to impose strong sanctions to protect the discovery process and to deter such conduct in the future. *National Hockey League v. Metropolitan Hockey Club,* 427 U.S. 639, 643, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976).[3]

[3]In National Hockey League the Supreme Court affirmed that the "most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." Otherwise, "other parties to other lawsuits would feel freer than we think Rule 37 contemplates they should feel to flout other discovery orders of other District Courts." 427 U.S. at 643. The Supreme Court's teaching is particularly relevant here, because this is not the first time that the Secretary has refused to abide by a District Court's order permitting discovery under similar facts. See Donovan v. Gretna Machine and Ironworks, Inc., supra.

Therefore, the Secretary's action is due to be dismissed with prejudice and Mosher is entitled to present an itemization of all reasonable attorney's fees and expenses incurred by the Secretary's failure to allow the ordered discovery. In addition, under Rule 37(b)(2)(A) and (D), Mosher is due to be granted a default judgment on its counterclaim, and Mosher's allegations that OSHA's inspection plan is discriminatory and unreasonable shall be taken to be established as to Mosher. Finally, the inspection warrant issued on August 16, 1983, is due to be quashed and the Secretary permanently enjoined from inspecting or attempting to inspect Mosher pursuant to the inspection plan upon which the warrant is based. Accordingly, it is

ORDERED, ADJUDGED and DECREED that defendant's motion for sanctions be and it hereby is GRANTED and plaintiff's action is hereby DISMISSED WITH PREJUDICE; and it is

FURTHER ORDERED that judgment by default be and it hereby is ENTERED in favor of the defendant, Mosher Steel Company, and against the plaintiff on defendant's counterclaim and defendant's allegations that OSHA's inspection plan is discriminatory and unreasonable shall be and they hereby are ESTABLISHED for purposes of this action as to Mosher Steel Company; and it is

FURTHER ORDERED that the inspection warrant issued on August 16, 1983, to the plaintiff for inspection of Mosher Steel's premises be and it hereby is QUASHED and the Secretary of Labor, his agents, servants, officers, employees or attorneys, or any persons in active concert with them, are hereby PERMANENTLY ENJOINED from inspecting or attempting to inspect Mosher Steel Company pursuant to the inspection plan upon which the August 16, 1983, warrant was based.

DONE and ORDERED this 18th day of January 1985.

UNITED STATES DISTRICT JUDGE
J. FOY GUIN, JR.

No. 86-523

Supreme Court, U.S.
FILED
DEC 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

MOSHER STEEL COMPANY, DIVISION OF TRINITY INDUSTRIES, INC., AND ROGER LOVE, PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a magistrate's finding that probable cause justified the issuance of an inspection warrant under the Occupational Safety and Health Act, 29 U.S.C. 651 *et seq.*, may be challenged on the basis of evidence that was not before the magistrate, in the absence of a showing that the warrant application contained either an intentional misstatement or a misstatement made in reckless disregard of the truth.

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In the Supreme Court of the United States

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MOSHER STEEL COMPANY, DIVISION OF TRINITY INDUSTRIES, INC., AND ROGER LOVE, PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 791 F.2d 1535. The opinions of the district court (Pet. App. D1-D5, E1-E5) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B2) was entered on June 25, 1986, and a petition for rehearing was denied on July 30, 1986 (Pet. App. C1-C2). The petition for a writ of certiorari was

filed on September 30, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 16, 1983, an Occupational Safety and Health Administration (OSHA) compliance officer applied to a federal magistrate for a warrant authorizing an inspection of the manufacturing plant operated by petitioner Mosher Steel Company in Birmingham, Alabama. The warrant application contained an affidavit from an employee of the Birmingham area OSHA office stating that Mosher Steel's plant had been selected for inspection pursuant to a programmed health inspection plan that provided for periodic inspections of places of employment. The affidavit described the manner in which the plant had been selected for inspection and a copy of the OSHA inspection plan was attached to the affidavit. Pet. App. A1-A2; R. 7-26.[1] The magistrate found that the Secretary had established administrative probable cause to search Mosher Steel's plant and issued the warrant. Mosher Steel refused to honor the warrant. Pet. App. A2, E2-E3.

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[1] The affidavit explained that "Mosher is believed to have a primary SIC [Standard Industrial Classification] of 3441 (Fabricated Structural Metal) which * * * ranks 28th of the 250 most hazardous industries in the State of Alabama, is believed to employ approximately 250 employees, and has not undergone a complete OSHA inspection since June 1976" (R. 11). ("R." refers to the record filed in the court of appeals.) It stated that an inspection of Mosher Steel was indicated "because of its sequence number of 128 of 459 on the Birmingham cycle one [inspection] list" (*ibid.*) and that Mosher was scheduled for inspection during the week of April 22, 1983 "because Mosher was the next employer on the cycle list in geographic proximity to the Area Office" (R. 12).

The Secretary instituted civil contempt proceedings in the United States District Court for the Northern District of Alabama based upon petitioners' refusal to permit the inspection authorized by the warrant. Petitioners filed a counterclaim for a declaratory judgment, alleging that OSHA's entire programmed inspection plan is unreasonable and discriminatory and violates the Fourth and Fifth Amendments. Petitioners served a subpoena duces tecum to depose the OSHA supervisor responsible for scheduling the inspection of Mosher Steel; the subpoena also sought the production of a variety of documents relating to the design and operation of the inspection plan. Pet. App. A1, E2.[2]

The Secretary moved to quash the subpoena and sought a protective order barring all discovery; he contended that discovery was improper because the question whether the warrant application established administrative probable cause turns solely upon the sufficiency of the information contained in the application itself. Petitioners, in turn, moved to compel discovery. The district court granted the motion to compel discovery; the court subsequently denied the Secretary's motion to dismiss the counterclaim for want of jurisdiction. Pet. App. D1-D5.

The Secretary moved for certification for interlocutory appeal under 28 U.S.C. 1292(b) of the district court's determinations regarding the discovery

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[2] The subpoena duces tecum directed the OSHA safety supervisor to produce all writings, records, reports, charts, graphs, computer printouts, memoranda, statistical summaries, statistical data, and procedure manuals that support the allegations made in the warrant application or otherwise relate to the formulation and operation of OSHA's inspection plan (R. 49).

and jurisdictional issues. The district court granted the request but the court of appeals declined to permit the appeal. The district court then ordered the Secretary to comply with its discovery order; the Secretary again refused. Petitioners moved for sanctions pursuant to Rule 37(b) of the Federal Rules of Civil Procedure. Pet. App. A1, E3.

The district court granted petitioners' motion, dismissed the contempt action, and awarded costs and attorney's fees to petitioners (Pet. App. E1-E5). The court also "granted a default judgment on [petitioners'] counterclaim," stating that "Mosher's allegations that OSHA's inspection plan is discriminatory and unreasonable shall be taken to be established as to Mosher" (*id.* at E5). It also "permanently enjoined [the Secretary] from inspecting or attempting to inspect Mosher pursuant to the inspection plan upon which the warrant is based" (*ibid.*).

2. The court of appeals reversed by a divided vote (Pet. App. A1-A12). The court held that "[t]he district court had no power to order discovery beyond the so-called 'four corners' of the warrant application" (*id.* at A3). Observing that " '[i]t is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention'—that is, within the four corners of the warrant application" (*ibid.*, quoting *Aguilar* v. *Texas*, 378 U.S. 108, 109 n.1 (1964)), the court found that "[t]he four corners rule logically applies to all warrants, criminal or administrative" (Pet. App. A3). That is because "the reviewing court is charged with examining the magistrate's actual probable cause determination—not what he or she might have concluded based on in-

formation not presented in the warrant application" (*id.* at A3-A4).[3]

The court also rejected petitioners' argument that the OSHA inspection plan is subject to independent review in an action to enforce a warrant. It noted that

> [t]he magistrate's probable cause determination in issuing an administrative warrant necessarily includes a review of the inspection plan on which the search is to be based. * * * The information presented to the magistrate unquestionably must be sufficient to satisfy that officer that he or she can properly assess the plan's neutrality. If this information is not sufficient, then the remedy is not to permit broad discovery beyond the scope of the warrant application by the employer on review—it is for the magistrate to deny the warrant in the first instance.

Pet. App. A5 (citation omitted). The court found that the "broad-based inquiry" sought by petitioners would "invite misuse of the warrant process mandated by the Supreme Court" (*ibid.*).

Judge Tuttle dissented (Pet. App. A7-A10). He stated that a court reviewing a warrant based upon an administrative search plan must "be granted full authority to examine the facts presaging the formulation and operation of the plan if they are not included as a part of the affidavit" (*id.* at A9). This

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[3] The court observed (Pet. App. A4 n.1) that an exception to this general rule was recognized in *Franks* v. *Delaware*, 438 U.S. 154 (1978), for situations in which the party challenging the warrant makes a specific showing that the warrant application contains deliberately or recklessly false statements. It noted that "[n]o *Franks* claim is raised here" (Pet. App. A4 n.1).

is because "[a] mere surface examination of the plan may not insure that the plan in its development and actual operation has been conducted in the 'reasonable' and 'neutral' manner required by the Supreme Court" (*id.* at A9-A10).

ARGUMENT

Petitioners contend that they should be permitted to challenge the Secretary's inspection plan on the basis of evidence that was not included in the affidavit attached to the application for the search warrant; their position is squarely at odds with this Court's conclusion in *Franks* v. *Delaware*, 438 U.S. 154 (1978), that information outside a warrant application generally cannot be considered in determining whether a warrant was justified by probable cause. The court of appeals' determination that this principle requires the rejection of petitioners' claim is correct and does not present a conflict with any decision of this Court or another court of appeals. Review by this Court is therefore not warranted. Indeed, just last Term this Court declined to review a claim identical to that presented by petitioners. See *Hackney, Inc.* v. *Brock*, cert denied, No. 85-874 (Mar. 24, 1986).[4]

1. The Occupational Safety and Health Act empowers the Secretary of Labor to "inspect and investigate" any place of employment within his jurisdiction in order to carry out the purposes of the Act (29 U.S.C. 657(a)). In *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978), this Court held that the Fourth

[4] The issue presented in this case is now pending in the United States Court of Appeals for the Eighth Circuit. *Donovan* v. *Trinity Industries, Inc.*, No. 86-1623 (docketed May 20, 1986).

Amendment requires the Secretary to obtain a warrant before he may conduct a nonconsensual inspection. The Court emphasized, however, that "[p]robable cause in the criminal law sense" is not needed to justify the issuance of a warrant (436 U.S. at 320-321 (citation and footnotes omitted)):

> For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights.

The Court stated that the requirement of a warrant would curb the "unbridled discretion" of enforcement personnel (*id.* at 323) without "impos[ing] serious burdens on the inspection system or the courts" (*id.* at 316).

The Secretary conducts two types of inspections under the Occupational Safety and Health Act: (1) inspections initiated as a result of specific evidence of a violation, which are termed "complaint" inspections; and (2) inspections pursuant to a general enforcement plan providing for periodic inspections of places of employment in order to detect health or safety violations of the statute, which are termed

"programmed" inspections (see *Barlow's*, 436 U.S. at 320-321 & n.17). In the present case, the application for the warrant was based on a general plan for programmed inspections under which OSHA focuses its limited enforcement resources on industries in which employees are subject to a high rate of injury.

As explained in the warrant application,[5] the Secretary's plan operates as follows. The plan identifies as "high rate" industries those industries in which one or more of the occupational injury incidence rates published by the Bureau of Labor Statistics is higher than the average injury rate for private sector industry as a whole. The agency compiles and disseminates to its area field offices a report for each state that lists—in descending order—the high rate industries for each state. The industries are classified by Standard Industrial Classification (SIC) Code and the agency obtains from Dun's Marketing Service a list containing the names and addresses of all establishments in those industries. Within each industry, establishments are listed by county according to size; all establishments that received a full-scope inspection within the previous fiscal year are deleted from the list. Finally, based on this ranking, each OSHA area office compiles an inspection register listing the establishments subject to inspection in the fiscal year. OSHA Instruction CPL 2.45A; OSHA Instruction CPL 2.25C. Within the yearly inspection cycle, establishments may be selected and inspected in any order "that makes efficient use of

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[5] At the time the warrant in this case was issued, programmed inspections were covered by OSHA Instructions CPL 2.25C (Empl. Safety and Health Guide (CCH) ¶ 4009 (1982)) and CPL 2.45A (Field Operations Manual (CCH), ch. II (1983)).

available resources." OSHA Instruction CPL 2.45A, Section E.2.a.(4). The Birmingham Area Office, which scheduled the inspection in this case, generally selects employers from the cycle list in descending order, taking into account geographic and other considerations (R. 11).

The magistrate determined that the facts set forth in the warrant application in this case established the probable cause required by this Court's decision in *Barlow's* (R. 27-28). The application provided a detailed explanation of the selection plan and included a copy of the plan itself as well as the OSHA safety supervisor's sworn statement that Mosher Steel was selected according to the provisions and procedures set forth in the administrative plan. The courts of appeals repeatedly have found similar applications sufficient to satisfy the administrative probable cause requirement. See, *e.g.*, *Donovan* v. *Hackney, Inc.*, 769 F.2d 650 (10th Cir. 1985), cert. denied, No. 85-874 (Mar. 24, 1986); *Donovan* v. *Wollaston Alloys*, 695 F.2d 1, 5 (1st Cir. 1982); *Stoddard Lumber Co.* v. *Marshall*, 627 F.2d 984, 988 (9th Cir. 1980); *Marshall* v. *Chromalloy American Corp.*, 589 F.2d 1335, 1342-1343 (7th Cir.), cert. denied, 444 U.S. 884 (1979). The court of appeals therefore correctly concluded that the magistrate had all of the information needed to determine whether the warrant application was supported by probable cause.[6]

Petitioners contend they should be permitted to challenge the validity of the Secretary's inspection

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[6] Because the district court dismissed the Secretary's contempt action and quashed the inspection warrant, that court did not address petitioners' challenge to the magistrate's probable cause determination. The court of appeals therefore remanded the case to the district court for further proceedings in accordance with its decision (see Pet. App. A7).

plan on the basis of evidence (which they hope to obtain through discovery) that was not before the magistrate who issued the warrant. To this end, they sought to inquire into, and the district court ordered discovery of, a wide array of documents relating to the inspection plan.[7] This Court considered a similar argument in *Franks* v. *Delaware*, *supra*. The issue in *Franks* was whether a defendant in a criminal proceeding could introduce evidence that was not considered by the magistrate who issued the search warrant in order to challenge the sufficiency of the showing of probable cause in the affidavit supporting the warrant. This Court stated that "[t]here is * * * a presumption of validity with respect to the affidavit supporting the search warrant" and held that the party challenging the validity of a warrant can go behind the facts set forth in the affidavit only if his claim is supported by "allegations of deliberate falsehood or of reckless disregard for the truth * * * accompanied by an offer of proof" (438 U.S. at 171).

The Court observed that several considerations weighed against permitting a party challenging a warrant to introduce evidence that was not before the magistrate who issued the warrant. In particular, it noted that the Fourth Amendment interests of the party challenging the warrant were "protected by [the] requirement that applicants for a warrant submit a sworn affidavit and by the magistrate's independent determination of sufficiency based on the face of the affidavit" (438 U.S. at 166). In this connection it is relevant that "the magistrate already is equipped to conduct a fairly vigorous inquiry into the

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[7] Petitioners admit that the plan "on its face * * * appears to satisfy *Barlow's* requirement that the plan contain specific neutral criteria" (Pet. 10).

accuracy of the factual affidavit supporting a warrant application" (*ibid.*). The Court found that these and other considerations favoring the exclusion of evidence that was not considered by the issuing magistrate are outweighed only where the party challenging the warrant can make a substantial preliminary showing that the affidavit supporting the warrant contains deliberate falsehoods or statements made in reckless disregard of the truth.

Here, petitioners did not allege or show, and the district court did not find, that the safety supervisor acted with reckless disregard for the truth or made intentional misrepresentations in the warrant application. Moreover, petitioners provide no support for their bare suggestion (Pet. 10) that they may have been singled out for selective enforcement.[8] The rule set forth in *Franks* accordingly would bar the challenge to the inspection plan if *Franks* applies in this context. Indeed, the argument pressed by petitioners cannot be distinguished from the claim considered by the Court in *Franks*: petitioners too argue that evidence that was not before the issuing magistrate will undercut the magistrate's finding that the application for a warrant established probable cause.

Petitioners contend (Pet. 8, 11) that *Franks* does not apply here because the warrant was issued pursuant to the Secretary's enforcement plan rather than on the basis of an allegation of the existence of a statutory violation. However, the courts of appeals have uniformly concluded that *Franks* applies in the present context. Pet. App. A3-A5; *Donovan* v. *Hackney, Inc.*, *supra*; *Brock* v. *Gretna Machine & Iron*

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[8] As we have discussed, the affidavit in the warrant application stated that the Mosher Steel plant was selected pursuant to the inspection plan.

Works, Inc., 769 F.2d 1110 (5th Cir. 1985); *Marshall* v. *Milwaukee Boiler Mfg. Co.*, 626 F.2d 1339 (7th Cir. 1980).[9]

The considerations underlying *Franks*—including the interest in judicial economy and finality of magistrates' probable cause determinations—apply with equal force to justify a limit on challenges to probable cause determinations based upon administrative inspection plans. Moreover, the Occupational Safety and Health Act explicitly contemplates that the Secretary will exercise his inspection power "without delay." 29 U.S.C. 657(a)(1); see *Marshall* v. *Shellcast Corp.*, 592 F.2d 1369, 1372 (5th Cir. 1979). If employers are permitted to transform warrant enforcement proceedings into full-scale evidentiary hearings, complete with wide-reaching discovery far removed from the magistrate's narrow inquiry, every OSHA inspection could be subject to lengthy delays. Such extensive litigation over the inspection plan and selection process plainly is inconsistent with this Court's indication in *Barlow's* that the resources required by the warrant enforcement process would not "exceed manageable proportions" (436 U.S. at 321).[10]

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[9] Petitioners imply (Pet. 13 n.4) that Professor LaFave has reached a different conclusion, but the passage of his treatise cited by petitioners has nothing to do with the application of *Franks* to the administrative search context. A statement in the supplement to the treatise indicates that Professor LaFave believes that the magistrate's probable cause determination must be assessed by reference to the information contained in the warrant application. 3 W. LaFave, *Search and Seizure* § 10.2(d), at 128 & n.61.3 (Supp. 1986).

[10] The court of appeals observed that "given the general [judicial] acceptance of the so-called 'worst-first' inspection plan followed by the Secretary, [petitioners'] tactic may be

In addition, contrary to petitioners' assertions (Pet. 8), the court of appeals' decision neither conflicts with nor undermines *Barlow's* or its predecessors, *Camara* v. *Municipal Court*, 387 U.S. 523 (1967) and *See* v. *Seattle*, 387 U.S. 541 (1967). The magistrate's review of the inspection plan in the context of a warrant application provides full protection for employers' Fourth Amendment interests. *Barlow's* held that the probable cause standard is satisfied if the affidavit shows that "a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources" (436 U.S. at 321). As the court of appeals found (Pet. App. A5), a magistrate presented with the enforcement plan and the reasons for the selection of the particular employer must determine whether the *Barlow's* test has been satisfied. If he cannot conclude that the test is satisfied, he must deny the request for the warrant.

Petitioners' assertions (Pet. 11-12) that "meaningful review of the plan can only be accomplished by allowing full and free discovery" and that the decisions of the courts of appeals "will absolutely and totally prohibit employers from ever challenging the fairness and the constitutional reasonableness of the inspection plan" thus are obviously incorrect. Employers' Fourth Amendment rights are protected because the magistrate must conclude that probable cause under *Barlow's* has been established before he issues a warrant. Moreover, as in the present case, the magistrate's determination is subject to pre-enforcement judicial review on the basis of the ma-

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[a] calculated * * * deliberate impediment to enforcement" (Pet. App. A5-A6 n.2 (citations omitted)).

terials submitted with the warrant application. For these reasons, the court of appeals correctly held that petitioners may not go beyond the "four corners" of the warrant application in challenging the factual basis for the issuance of the warrant in this case.[11]

2. Petitioners erroneously contend (Pet. 11-12) that the court of appeals' decision conflicts with the decision of the Virginia Supreme Court in *Mosher Steel-Virginia* v. *Teig*, 327 S.E.2d 87 (1985). In that case, the court considered the validity of a warrant issued pursuant to the Virginia Occupational Safety and Health Act and concluded that the warrant application did not establish probable cause (327 S.E. 2d at 94). The state court adopted a state law standard governing the type and quantum of information that a state agency must present in order to establish administrative probable cause (*id.* at 93). Although this state standard obviously is inapposite here, most of the "specific facts" that the Virginia court required the state agency to include in a warrant ap-

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[11] The fact that petitioners dressed their challenge to the magistrate's probable cause determination in the procedural garb of a counterclaim attacking the validity of the inspection plan does not permit them to avoid this rule. As we have discussed, the probable cause determination necessarily encompasses consideration of the validity of the inspection plan; the counterclaim is simply an effort to circumvent the limitations imposed by *Franks* upon review of the magistrate's determination. It is not surprising that the court of appeals viewed "Mosher's tactic * * * [of] resistance to a search, coupled with a counterclaim and request for discovery on the inspection plan in the subsequent contempt proceedings [as] the latest 'stop OSHA' strategy" (Pet. App. A6 n.2). *Franks* plainly applies to the declaratory judgment claim as well, precluding consideration of materials that were not before the magistrate when the probable cause decision was made.

plication—*e.g.*, the criteria used to designate "high rate" industries, the method by which establishment lists are compiled, a description of the selection process, and the employer's inspection history—were contained in the application in the present case. In any event, the Virginia case concerns state law and cannot affect the requirements imposed by the federal statute.

Since the Virginia court held that the warrant application on its face did not satisfy the probable cause standard, the court's statement (327 S.E.2d at 92 (footnote omitted)) that an employer may "adduce[] evidence beyond the limits of the supporting affidavit" in challenging a warrant based on a general inspection plan is simply dictum. This is especially true because the court expressly declined to address a basic issue in this case—whether an employer may conduct discovery into the design and operation of the inspection plan (*id.* at 94). Finally, it is noteworthy that the court's dictum regarding the consideration of evidence not contained in the application for the warrant was preceded by a quotation from the Virginia Constitution's prohibition upon general warrants (see *id.* at 92); the court's conclusion therefore may rest upon its interpretation of the State Constitution rather than the Fourth Amendment. For these reasons, there is no conflict between the decision below and *Mosher-Virginia* warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER TERM, 1986

MOSHER STEEL COMPANY, DIVISION OF TRINITY INDUSTRIES, AND ROGER LOVE, Plant Manager,
Petitioners,

v.

WILLIAM E. BROCK, Secretary of Labor,
United States Department of Labor,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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APPENDIX

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MISCELLANEOUS

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No. 86-523

In The

Supreme Court of the United States

OCTOBER TERM, 1986

MOSHER STEEL COMPANY, DIVISION OF TRINITY INDUSTRIES, AND ROGER LOVE, Plant Manager,

Petitioners,

v.

WILLIAM E. BROCK, Secretary of Labor, United States Department of Labor,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

There is an inherent difference betwen an inspection based on an employee's complaint, which is analagous to *Franks v. Delaware,* 438 U.S. 154 (1978), and an inspection based on OSHA's administrative inspection plan. In the former instance there is some assurance that violations of law exist. In the latter instance, the plan itself provides the only evidence to be weighed against the employer's privacy interest. *Brock v. Gretna Machine & Ironworks,* 769 F.2d 1110,1112 (5th Cir. 1985). Thus, judicial review of the plan is

necessary to insure that an employer's Fourth Amendment privacy rights are protected. Judicial review of the plan is also necessary to protect the employer's Fifth Amendment due process right to fair, even-handed enforcement of the Act.

The importance of the fairness of OSHA's inspection plan has been magnified by the Fifth Circuit's recent application of *I.N.S. v. Lopez-Mendoza,* 468 U.S. 1032 (1984) to OSHA warrant cases. In *Smith Steel Casting Co. v. Brock,* 800 F.2d 1329 (5th Cir. Sept. 19, 1986), the court interpreted *Lopez-Mendoza* to mean that even if the Secretary obtains a warrant and inspects pursuant to a discriminatory, unfair plan, the evidence of violations will not be supressed. Rather, the exclusionary rule will only apply to the monetary penalties assessed by OSHA.

In the past, the Secretary's only incentive to comply with the Fourth and Fifth Amendments has been the prospect that all evidence obtained under an invalid warrant might be suppressed. The Secretary, and particularly his agents in the field, are not motivated by the assessment of monetary penalties. Indeed, in most cases the penalties are insignificant compared to abatement or litigation costs. Thus, the application of *Lopez-Mendoza* to OSHA warrant cases leaves the Secretary absolutely no incentive to comply with the Fourth and Fifth Amendments in the enforcement of the Occupational Safety and Health Act. Under these circumstances, a declaration as to the fairness of OSHA's selection procedure —*i.e.,* the plan, becomes even more important.

In deciding whether to grant Mosher's petition this Court must consider whether the magistrate can conduct a meaningful review of the design and operation of OSHA's inspection plan in an *ex parte* warrant application. The Secretary

argues that he can, and that if the plan is unfair the remedy is for the migistrate to simply not issue the warrant. Trial judges, however, have long recognized that, in practice, the Secretary's position "blinks at reality."[1] "In an *ex parte* motion the Magistrate cannot be expected to conduct a focused and detailed inquiry into the manner in which a plan is designed to operate." *Brock v. Gretna Machine & Ironworks, supra.*[2] "[C]ertain aspects of the plan," such as whether it "has an alleged discriminatory effect" can not be "considered by the magistrate in issuing the search warrant." *Donovan v. Hackney, Inc.*, 583 F.Supp. 773, 776 (W. D. Okla. 1984) aff'd 769 F.2d 650 (10th Cir. 1985) cert. denied No. 85-874 (March 14, 1986). Professor LaFave likewise affirms that in an *ex parte* warrant proceeding, the arbitrariness of the plan is "a matter not considered by the magistrate." LaFave, *Search and Seizure, A Treatise On The Fourth Amendment*, § 10.2 pp. 224-226 n.66. This is precisely Judge Tuttle's point below when he notes "a mere surface examination of the plan [in an *ex parte* warrant proceeding] may not insure that the plan in its development and actual operation has been conducted in the 'reasonable' and 'neutral' manner required by the Supreme Court." *Donovan v. Mosher Steel Co.*, 791 F.2d 1535, 1540 (11th Cir. 1986).

The Secretary's contention in his Brief In Opposition that the magistrate is provided "all of the information needed" (p. 8-9) to determine the reasonableness of the plan is

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[1]To quote then District, Judge Patrick Higginbotham in *Marshall v. Huffhines Steel Company*, 488 F.Supp. 995 (N.D. Tx. 1979), aff'd *sub nom Donovan v. Huffhines Steel Company*, 645 F.2d 288 (5th Cir. 1981), p. 40, Transcript of proceedings, October 12, 1979.

[2]Quoting District Judge Heebe in his preliminary Order of February 14, 1983, granting discovery into OSHA's plan. See Appendix A at n. 4. In the district court the case was styled *Donovan v. Gretna Machine & Ironworks, Inc.*

simply not correct. For instance, it cannot be disputed that the underlying establishment lists are essential to the operation of the plan. If those lists are incomplete and inaccurate, then whole groups of employers are *de facto* exempted from inspection, while those who are on the lists are subjected to repeated inspections. Yet, the Secretary acknowledges that these lists are not provided to the magistrate (p. 8-9) and the magistrate has no way to verify that the lists are reasonably accurate.[3]

It is not Mosher's motive to "stop OSHA", but to obtain fair, even-handed enforcement of the law. Review of information presented to magistrates in a number of OSHA warrant cases, together with limited discovery in some cases, and actual experience, indicates that OSHA's inspection plan exempts large numbers of high hazard employers — including many of Mosher's competitors — from enforcement of the law, while subjecting a small percentage of employers to repeated inspections. Mosher has therefore brought a declaratory judgment action seeking meaningful judicial review of the fairness of OSHA's inspection plan, and whether it provides for selective enforcement. The Secretary's argument that discovery into the plan would impose an impossible burden on the government is belied by actual experience in other cases. As noted before the district court, the Secretary has agreed to such discovery in previous cases and the discovery took less than a day to complete. And, of course, any confidential documents can be protected by

[3]The Secretary's statement that the lists (purchased from Dunn & Bradstreet) contain the names of "all establishments" in the so-called high hazard industries is flatly untrue. Routine comparison of information provided to the magistrate with such sources as manufacturing directories published by state chambers of commerce indicates that OSHA's establishment lists are *grossly* inaccurate, and frequently do not include *many* of the establishments in high hazard SIC groups — including some direct competitors.

suitable protective orders. A judicial determination that OSHA's inspection plan is reasonable would ultimately result in *less* litigation. Mosher seeks a judicial hearing in the instant case because of a good faith belief that the plan used by OSHA is unreasonable and discriminatory. OSHA's steadfast refusal to allow Mosher to examine the plan substantiates the belief there is something very wrong with the plan. On the other hand, if OSHA can demonstrate its plan is constitutional, any employer would be most reluctant to risk the court's contempt and incur the legal expense of challenging a warrant. Thus, judicial review of OSHA's inspection plan would not result in "litigation laden delays" as long as OSHA can demonstrate it has a reasonable plan. Instead, express judicial approval of OSHA's plan would result in even fewer employers demanding a warrant because of their knowledge they were selected for inspection pursuant to a reasonable system.

CONCLUSION

As stated previously, the pivotal issue is whether the Secretary's administrative selection plan is subject to meaningful judicial review. Or, put another way, is the Secretary required to act openly and fairly in the enforcement of the Act? Judge Tuttle below recognized that the plan may be "inherently discriminatory" and "invideous". 791 F.2d at 1541. To sanction the existence of such a plan by casually issuing a warrant for its enforcement destroys public confidence in government. *Id.* The principles announced in *Franks* should therefore not be "mechanically applied" to administrative warrants. *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950, 963 (11th Cir. 1982) (Judge Roney, specially concurring). More importantly, *Franks* should not

be mechanically applied to preclude a declaratory judgment action challenging OSHA's entire inspection plan on both Fourth and Fifth Amendment grounds.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of December 1986, three copies of this Petition for Writ of Certiorari were placed in the United States Mail, certified, return receipt requested, postage prepaid, to counsel for all parties required to be served, said parties being Mr. Charles Fried, the Solicitor General, Department of Justice, Washington, D.C. 20530, and Andrea Casson, U.S. Department of Labor, Room S 4004, Washington, D.C. 20210.

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APPENDIX A

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor

v.

GRETNA MACHINE AND IRONWORKS, INC., and MARTIN DE MATTEO

CIVIL ACTION

NO. 82-1507

SECTION "F" (B)

O R D E R

This cause came on for hearing on a previous day on motion of plaintiff to review Magistrate's findings.

The Court, having heard the arguments of counsel and having studied the legal memoranda submitted by the parties, is now fully advised in the premises and ready to rule. Accordingly,

IT IS THE ORDER OF THE COURT that Gretna Machine and Ironworks SHALL BE ALLOWED to conduct discovery as to the formulation and operation of the plan relied upon to establish probable cause.

IT IS THE FURTHER ORDER OF THE COURT that Gretna Machine and Ironworks shall NOT BE PERMITTED to conduct discovery into any matter not relied upon by OSHA to establish administrative probable cause for the inspection.

REASONS

In this action, the Occupational Safety and Health Administration (OSHA) seeks to have Gretna Machine and Ironworks (Gretna) adjudged in civil contempt for failure to allow an inspection pursuant to a search warrant. Currently before the Court are certain requests for discovery by the defendant. At issue is the scope of the discovery, if any, to be allowed.

In Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), the Supreme Court held that the Fourth Amendment requires a programmed OSHA inspection to be conducted pursuant to a warrant and scheduled "pursuant to an administrative plan containing specific neutral criteria." *Id.* at 323. Pursuant to this mandate, OSHA created a series of plans, including CPL 2.25A. Relying upon CPL 2.25A to establish administrative probable cause, OSHA obtained a search warrant and attempted to make a programmed health inspection of defendant's premises. Gretna dishonored the warrant, prompting this complaint for civil contempt. Gretna has answered the complaint and counterclaims for a judgment declaring that the programmed health inspection procedure violates the Fourth and Fifth Amendments. The discovery is sought to aid in the defense of the complaint and in the prosecution of the counterclaim.

Gretna contends that the affidavit upon which the warrant was issued is defective; moreover, they contend that the administrative plan, pursuant to which the inspection was scheduled, is not based on neutral criteria.

In Franks v. Delaware, 438 U.S. 154 (1978) the Supreme Court held that a challenge to a warrant will be limited to the sufficiency of the warrant and affidavits. If a substantial preliminary showing can be made that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included in the affidavit, and that the affidavit without such statement is insufficient, the defendant will be entitled to an evidentiary hearing at which the warrant can be voided. Conversely, if a substantial preliminary

showing is not made, matters not appearing on the face of the affidavit will not be considered and will be irrelevant. The Federal Rules of Civil Procedure provide that matters which are irrelevant are not discoverable. Fed. R. Civ. P. 26(b), 33, 34.

While the so-called *Franks* "four corners" doctrine was announced in the criminal context, the jurisprudence has extended its application to OSHA warrants. West Point-Pepperell, Inc. v. Donovan, 689 F.2d 950, 959 (11th Cir. 1982); Marshall v. Horn Seed Co., 647 F.2d 96, 104 (10th Cir. 1981); In re J. R. Simplot Co., 640 F.2d 1134, 1138 (9th Cir. 1981).

In the instant case, no substantial preliminary showing has been made that false statements were deliberately or recklessly made in the affidavit. Accordingly, Gretna will not be entitled to a *Franks* evidentiary hearing into matters not appearing on the face of the warrant, nor may discovery be had into matters relevant only at a *Franks* hearing.

Gretna's second argument is that the plan was not based on neutral criteria and, therefore, does not establish probable cause. The *Franks* doctrine does not preclude this challenge to the sufficiency of the affidavit and attachments to establish administrative probable cause. Such a challenge is analogous to a challenge to the sufficiency of factual assertions to establish probable cause in a criminal warrant. In a criminal warrant the question is whether the affidavit taken as true establishes probable cause. The somewhat different question for a programmed administrative inspection warrant is whether the plan meets the neutrality requirements of *Marshall v. Barlow's, Inc., supra.* A proper subject of inquiry at this stage is the manner in which CPL 2.25A actually operates to select businesses for inspection.

According to CPL 2.25A and its Appendix A, "Health Inspection Plan," health inspections are scheduled according to a potential risk formula.[1] This formula was created by

[1]This is different from safety inspections, which are scheduled on the basis of accident experience in the industry. CPL 2.25A, p.2, E3a.

a process of extrapolation described in the appendix. A panel of experts in toxicology reviewed the literature in their field and assigned a hazard weight figure, or hazard rating, to each of numerous substances. It was then determined which industries[2] used which of these substances, and the industry was similarly rated. Industries using multiple substances were assigned some combined hazard weight. Then the appropriate hazard weight for each industry was multiplied by two other figures: an industry average employment figure and a degree of exposure figure. The result is a number designed to represent the relative health hazards presented to employees in various industries. Industries are ranked based on this number and certain industries are then designated high hazard industries. Businesses engaged in those industries are subject to inspection. Businesses actually inspected are chosen randomly from a list of area businesses engaged in high health hazard industries.[3]

The designation as a high hazard industry is a critical step in the process of inspection scheduling because it is OSHA policy to conduct at least 95% of its inspections in high hazard industries and no more than 5% elsewhere. CPL 2.25A, p.2, E3. It follows then that, in order for the whole selection process to be neutral, designation as high hazard must also be neutral. The Health Inspection Plan fails to completely describe the "*specific* neutral criteria," 436 U.S. at 323 (emphasis added) used in the calculations relied upon by OSHA in making high hazard designations. While the Health Inspection Plan may expedite the issuance of a warrant by briefly summarizing the process by which industries are designated high hazard, this practice cannot insulate this part of the probable-cause-creating process from

[2]The Standard Industrial Classification (SIC) scheme of categorization is used.

[3]It is well settled that this random selection process comports with the commands of *Barlow's*. Stoddard Lumber Co. v., Marshall, 627 F.2d 984 (9th Cir. 1980); Ingersoll Rand Co. v. Donovan, 540 F.Supp. 222 (M.D. Penn. 1982); Matter of Chicago Aluminum Casting Co., 535 F.Supp. 392 (N.D. Ill. 1981). In fact, it has been suggested that any random selection process of businesses in an industry would satisfy *Barlow's*. Matter of Urick Property, 472 F.Supp. 1193 (W.D. Penn. 1979).

discovery.[4] The entire plan used to schedule the inspection of Gretna, even if it is not mechanically included in the affidavit, is necessarily incorporated by reference, is part of the asserted foundation for probable cause, and is therefore subject to challenge in this suit. The operation of the plan is in issue and is subject to discovery.

OSHA raises two arguments in opposition to the discovery of the probable-cause-creating process. They contend that by permitting discovery of this process OSHA will be unduly burdened. We do not agree. In allowing discovery as set forth herein, OSHA would not be required to demonstrate that individual businesses are high risk; rather they need only demonstrate the health risk by industry, and show that the business to be inspected is engaged in that industry. Stoddard Lumber Co. v. Marshall, 627 F.2d 984 (9th Cir. 1980). The material necessary for such a showing is contained within agency files and need only be assembled once to establish the probable cause for any search made pursuant to that plan.

Moreover, it is unlikely that such a serious challenge will be mounted to every warrant issued or requested. "[T]he great majority of businessmen can be expected in normal course to consent to inspection. . . ." *Barlow's, supra*, 436 U.S. at 316. The Supreme Court's reasonable assumption belies the floodgates argument, in the absence of evidence to the contrary.

OSHA further contends that the material is priveleged. This argument is unconvincing. Providing information on the operation of the plan cannot subject anyone to criminal

[4]This is not to suggest that the Magistrate should have required more information about CPL 2.25A before issuing the warrant. As already noted, a programmed inspection plan is different in kind from the usual showing of probable cause. Probable cause is not established by the reporting of facts, but rather is created by the following of a procedure. In an ex parte motion the Magistrate cannot be expected to conduct a focused and detailed inquiry into the manner in which a plan is designed to operate. Such an inquiry should await the interested assistance of adversaries, if it becomes necessary.

penalties under 29 U.S.C. § 666(f).[5] Under the plan as described in the material submitted to the Magistrate, it would be impossible to predict which business will be inspected without having OSHA's random number table. Neither Gretna nor anyone else has this random number table. Also, the statute was clearly not designed to prohibit this discovery, but rather to prohibit inside tipping of businesses already scheduled.

Likewise, this discovery will not invade OSHA's deliberative process. It is irrelevant why OSHA chose a particular process, value or statistic in developing this plan. What was chosen, on the other hand, is extremely relevant, and has been placed in issue by OSHA itself.

We consider the ordered discovery to be implicitly mandated by *Barlow's, supra.* The Court's stated purpose in that case was to limit the scope of 29 U.S.C. § 657(a), which authorized inspection of business premises without requiring a warrant, and thereby to restrict the exercise of OSHA's "unbridled discretion. . . as to when to search and whom to search." 436 U.S. at 323. In furtherance thereof, the Court held that a search must be ordered by a neutral officer, and scheduled pursuant to reasonable, objective and fair standards; stating, in effect that businessmen must be given a fair roll of the dice. By their refusal to allow discovery OSHA is permitting businessmen to see the dice roll, but won't allow them to check if the dice are loaded. OSHA is seeking to hide from view precisely what *Barlow's* has required to be demonstrably fair. In so doing they violate both the spirit and the letter of the law.

Accordingly, for the reasons herein expressed, Gretna Machine and Ironworks SHALL BE ALLOWED to conduct discovery as to the formulation and operation of the plan relied upon to establish probable cause. Further, Gretna Machine and Ironworks SHALL NOT BE PERMITTED to conduct discovery into any matter not relied upon by OSHA to establish administrative probable cause for the inspection.

Frederick J. R. Heebe

[5]This section prohibits the giving of advance notice of a scheduled inspection.